JIM & ANN TATUM

IBLA 96-90, 96-91 Decided January 5, 2000

Appeals from two decisions of the Regional Director, Western Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement, affirming decisions of the Denver and Albuquerque Field Offices, determining that the State regulatory authority had taken appropriate action in response to a Ten-Day Notice issued in response to a citizen's complaint. No. CC-93-020-008.

Decision in IBLA 96-90 affirmed as modified; decision in IBLA 96-91 vacated and case remanded.

1. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

   Upon review of action taken by the state regulatory authority in response to a 10-day notice, OSM is obligated to conduct an inspection unless the state takes appropriate action to cause the violation to be corrected or shows good cause for failure to do so. "Good cause for failure to act" includes a finding that the alleged violation does not exist and OSM's standard on review of such a finding is whether the state regulatory authority's action or response to the 10-day notice is arbitrary, capricious, or an abuse of discretion under the state program.

2. Surface Mining Control and Reclamation Act of 1977: Enforcement Procedures: Generally--Surface Mining Control and Reclamation Act of 1977: Inspections: 10-Day Notice to State

   Assuming actions by a surface coal mining operation result in the diminution of a person's water supply, the operator is responsible for replacement of that water supply, in accordance with section 720(a)(2) of the Surface Mining Control and

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Reclamation Act of 1977, 30 U.S.C. § 1309a(a)(2) (1994), only if that water supply constitutes a "drinking, domestic, or residential water supply."

3. Surface Mining Control and Reclamation Act of 1977: Citizen's Complaints: Generally--Surface Mining Control and Reclamation Act of 1977: State Program: 10-Day Notice to State--Surface Mining Control and Reclamation Act of 1977: Subsidence: Generally

When the record on appeal establishes that the state regulatory authority's response to a 10-day notice of a state regulatory program subsidence violation by an underground coal mining operation was arbitrary, capricious, and an abuse of discretion, the OSM decision upholding the state regulatory authority's action will be vacated and the case remanded for appropriate action.

APPEARANCES: Ann Tatum, pro se and for Jim Tatum, Houston, Texas; Brock Wood, Esq., Office of the Regional Solicitor, U.S. Department of the Interior, Lakewood, Colorado, for the Office of Surface Mining Reclamation and Enforcement.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Jim and Ann Tatum (hereinafter, Tatums or appellants) have filed separate appeals from two decisions of the Regional Director, Western Regional Coordinating Center, Office of Surface Mining Reclamation and Enforcement (OSM), dated August 24, 1995, and September 18, 1995, determining that the responses of the State of Colorado, Department of Natural Resources, Division of Mining and Geology (DMG) were appropriate action in response to a Ten-Day Notice (TDN) issued by OSM. OSM issued the TDN to DMG following receipt of a citizen's complaint from the Tatums alleging that an underground mining operation conducted by Basin Resources, Inc. (BRI) (formerly, Wyoming Fuel Company), had caused subsidence damage to their home near Weston, Colorado, and damaged a livestock water well on their property. 1/

I. Factual and Procedural Background

On January 25, 1984, BRI obtained a permanent program permit (No. C-81-013) from the State regulatory authority. The permit, as revised July 2, 1990, authorized BRI to engage in underground coal mining operations on 9,068 acres of Federal and private land situated in Ts. 33

1/ The Board docketed the appeal of the Aug. 24, 1995, decision as IBLA 96-90 and the appeal of the Sept. 18, 1995, decision as IBLA 96-91. Those two appeals have been consolidated for purposes of this opinion.

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and 34 S., R. 67 W., Sixth Principal Meridian, Las Animas County, Colorado, in which BRI owned or leased the mineral estate. This included about 153 acres of land subsequently purchased by the Tatums in 1988 known as the "Solitario Ranch," part of which overlaid an alluvial valley floor (AVF) of the Purgatoire River. In order to prevent subsidence of the land surface from occurring within the AVF, BRI's permit specified an extraction rate of no more than 50 percent of the material underlying that land by the room and pillar method. BRI was otherwise permitted to engage in longwall mining.

In May 1988, BRI proposed to extend its existing underground coal mining operations (known as "First North Main") in the Maxwell coal seam of the Raton Formation, within its permitted area, northeast under the Colorado and Wyoming Railroad right-of-way, the Purgatoire River, and the right-of-way for State Highway 12, thereby crossing under the tract of land owned by the Tatums, which is bisected by the highway and the river. That tract of land contains an adobe house, part of which dates from the early 1900's, which is located south of the river and the highway and northeast of the railroad. 2/

At the time BRI proposed to extend its operations, the First North Main workings were located 2,150 feet southwest of the Tatums' house. BRI initiated room and pillar mining operations underneath the Tatums' property in May 1988. That operation involved construction of 18-foot- wide, 7.5-foot-high entries, surrounding 80-foot-square pillars. However, this mining ceased in July 1988 when productivity decreased and it became uneconomic to continue mining.

Ronald K. Thompson, a BRI employee who commenced work for the company in February 1990, explained, in a December 10, 1993, deposition, that he understood that water had accumulated in the workings, softening the mine floor and slowing operations. (Deposition at 27.) He stated that the mine was later sealed off and filled with water, thus preventing access. Id. at 4.

On November 27, 1990, DMG approved Technical Revision No. 15 to BRI's permit, which provided for drilling a 10- to 12-foot diameter airshaft ("NW-1 Shaft") to a depth of 590 feet in sec. 19, T. 33 S., R. 67 W., Sixth

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2/ The house has plaster interior walls and a wire-mesh reinforced cement stucco coating on the exterior. The eastern third of the house has two stories and the remainder is one story high. There is a partial basement under the western third of the house, which was added sometime after construction of the rest of the house. The remainder of the house is underlaid by a shallow crawl space. At the western end of the house, there is a short flagstone-covered breezeway which runs south to a two-car garage. In the center of the overall L-shaped configuration of the house, breezeway, and garage is a garden, enclosed by a low adobe wall.

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Principal Meridian, Las Animas County, Colorado. The shaft was intended to provide exhaust and ventilation for its underground mine workings known as the "First Left Longwall Panel." These workings involved mining by the longwall method, which resulted in the removal of a series of 600-foot-wide panels running along the strike of the coal (N. 25° W.), adjacent to development mains. The southern edge of the panels and the adjacent development mains were 530 and 370 feet from the Tatums' water well (Well No. 10), which is 300 feet south of their northern property line.

BRI's revised permit provided that "every reasonable attempt" would be made to eliminate or reduce the flow of ground water into the airshaft. Thus, when it drilled the shaft upwards from a total depth of 640 feet in January 1991, BRI sealed any fractures in the surrounding rock, prior to drilling, by injecting grout through three drillholes and cased the open borehole, following drilling, with steel. Despite BRI's efforts, however, water, flowing at the rate of from ½ to 2-1/2 gallons per minute, was encountered at various elevations in the shaft, all of which were below the bottom of the Tatums' well.

North of State Highway 12, BRI's airshaft is 355 feet northwest of the Tatums' water well. That well, which had historically used a windmill to bring water to the surface for livestock watering purposes, was constructed by the Tatums' predecessor-in-interest sometime before 1972. The well was determined on March 1, 1995, during a joint inspection by DMG and OSM, in the company of Tatums and BRI personnel, to be 145.1 feet deep. (Field Notes, dated March 1, 1995, at 1; see Letter to DMG from the Tatums, dated July 12, 1994 ("approximately 146 feet").) Thus, the well was completed in a geologic zone about 450 feet above the coal seam mined by BRI in the Raton Formation. Six-inch diameter casing was also found to be visible for a distance of at least 30 or 40 feet down in the well. At the time BRI's permit was issued in 1984, the well, which was not permitted by the Colorado Office of the State Engineer, Division of Water Resources, was listed in BRI's well survey as "not functioning." However, no record was made of the level or quantity of water in the well. Nevertheless, BRI was required, in its permit, to take appropriate mitigative measures, if its mining activities seriously affected the potential usage of any water well within 1 mile of its operations.

The evidence establishes that the Tatums never used the water well; rather it received only historic use. (Letter to DMG from the Tatums, dated February 9, 1993; "Investigation into Possible Adverse Impacts of Mining Operations on the Tatum Windmill Well," dated June 6, 1995, (June 1995 DMG Report) at 2.) Thompson stated, in his December 10, 1993, deposition, that he found the well inoperable on the various occasions that he observed it after February 1990, because "the mechanism that powers the windmill has been disconnected." (Deposition at 20.)

The Tatums have not asserted that they operated the well at any time during their ownership of their land or that it was ever in a condition to be operated. They claim only that they "had the windmill looked at in 1990

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to determine what windmill parts were needed," their position being that BRI's activities in 1991 caused the well to go dry. (Statement of Reasons for Appeal (SOR), IBLA 96-90, at 10, 11.)

By letter dated December 18, 1991, the Tatums first advised BRI that damage, which might be attributable to its underground mining operations, was occurring to their house. One year later, by letter dated December 15, 1992, they notified DMG that their water well was dry as a result of BRI's underground mining operations. On May 25, 1993, they sent a letter to DMG expressing concern that damage to their house was occurring as a result of subsidence caused by BRI's underground mining operations. The letter was accompanied by a May 24, 1993, report prepared by Vince J. Vigil, Las Animas County Building Inspector. Vigil, who, at the Tatums' request, had inspected their house on May 18, 1993, observed numerous structural cracks in the walls (both interior and exterior), ceilings, and corners of the various rooms and around the windows and doorways on both levels. He concluded that there had been recent earth movement in close proximity to the residence, but did not attribute it to subsidence caused by BRI's nearby underground workings. (Memorandum to the Tatums from Vigil, dated May 24, 1993, at 3.) Rather, Vigil advised the Tatums to hire a structural engineer to conduct an in-depth investigation of the cause and remedy. Id.

DMG responded to the May 25, 1993, letter and attached report on July 7, 1993, concluding that it did not appear that any damage to the house was caused by mine subsidence. In a subsequent letter to the Las Animas County Planning and Land Use Office, dated August 12, 1993, DMG expressed the same opinion.

By letter dated November 30, 1993, the Tatums filed a citizen's complaint with OSM alleging the BRI's underground mining operation had caused subsidence damage to their residence and damage to a water well on their property. On December 7, 1993, in response to the citizen's complaint, OSM issued TDN No. 93-020-370-005 to DMG, listing three violations of Colorado State program standards. The TDN described the violations as a failure to properly conduct a subsidence survey, subsidence monitoring, and subsidence control plan for the Tatums' property, in violation of sections 2.05.6(6) and 4.20 of 2 Colo. Code Regs. (1991) (Violation 1); failure to control adverse consequences to a water well on the property (Violation 2); and failure to provide a detailed operations plan of the proposed (or actual) underground workings as it related to the Tatum property (Violation 3). In accordance with 30 C.F.R. § 842.11, OSM required that the State take appropriate action to correct the violations or show good cause for failing to do so.

On December 20, 1993, DMG responded asserting that BRI had not violated State standards as alleged in Violations 1 and 3, and that, due to lack of historical information from the Tatums concerning the water well, it did not consider BRI to have violated State standards, as set forth in Violation 2. On February 4, 1994, following the receipt of further information from DMG, the Albuquerque Field Office (AFO), OSM, informed DMG that

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it considered its response to Violations 1 and 3 to be "appropriate," but the response to Violation 2 to be inappropriate. AFO explained, regarding Violation 2, that the facts alleged by the Tatums, if true, would constitute a violation of the State program and that the DMG was obligated to conduct a more thorough investigation. On the same date, OSM also informed the Tatums of the results of its review of DMG's response.

By letter dated February 14, 1994, DMG sought informal review of AFO's determination regarding Violation 2, in accordance with the procedures set forth in 30 C.F.R. § 842.11(b)(1)(iii), asserting that the inappropriate finding should be reversed because its investigation into the technical aspects of the alleged violation was ongoing. On May 26, 1994, the Deputy Director, OSM, responded to DMG's request for informal review by granting it an additional 60 days in which to complete its investigation.

By letter dated July 18, 1994, DMG informed AFO that it had completed its investigation and that, based on a letter from Jim Tatum stating that it appeared that an airshaft constructed by BRI had not harmed the water well, it believed the issue had been resolved. It requested that OSM find its response to Violation 2 to be appropriate. AFO forwarded this information to the Deputy Director, OSM, by memorandum dated July 29, 1994, stating "AFO does not believe that DMG's investigation answers the question whether or not the mine shaft has impacted the water well."

By letter dated December 2, 1994, the Tatums requested informal review, pursuant to 30 C.F.R. § 842.15(a), of that part of the AFO's February 1994 decision relating to Violations 1 and 3. The Deputy Director, OSM, acknowledged this request in a January 18, 1995, "interim response," wherein he also stated that his response would serve as "an update regarding our pending decision to Colorado Division of Minerals and Geology's (DMG) request for informal review of Part [Violation] 2 of the same TDN." He informed the Tatums that "the Colorado DMG has made a firm commitment to promptly take the lead in conducting a thorough technical investigation to determine whether Basin Resource's underground mining operations have impacted the water level in your well and have caused subsidence-related damage to your property." He stated that upon completion of DMG's technical investigation and review of subsequent actions taken by DMG, OSM would notify them of its decision on the violations.

On February 1, 1995, DMG and OSM officials, the Tatums, their mining engineer consultant, and representatives of BRI all visited the Tatums' house to conduct an investigation of the subsidence allegation. In his February 8, 1995, report of that investigation, DMG official, Jim Pendleton, an engineering geologist, stated at page 4 that there was "sufficient evidence to conclude that mine subsidence is not the cause of the Tatum residence's observed structural symptoms." In part, he based

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that conclusion on his observations of the foundation of the house. He stated at page 3 of his report:

> I entered the crawl space beneath the main floor from the partial basement. * * * I examined the crawl space foundation walls by flashlight * * *. The foundation consists of field rock and mortar walls founded in excavated trench[e]s. Two to three courses of unfinished adobe blocks are placed on top of the field stone wall as a leveling course. Finally, wooden blocks support the floor joists. The crawl space is excavated as much as 2 ½ feet into shale bedrock. * * * No cracking or disaggregation of the grout was observed at any location in the field rock walls or the adobe leveling course. While props and shims had been installed at several locations beneath the joists, * * * no movement appeared evident at any of these supported locations. None of these shimmed supports had been unloaded or dislodged.

However, in a subsequent memorandum to Susan McCannon, Coal Program Supervisor, DMG, dated June 2, 1995, Pendleton admitted that he was unable to enter the crawl space beneath the eastern two-story portion of the house or to make any observations regarding the condition of the foundation there.

In an undated "Trip Report," prepared by Mike Rosenthal, Chief, Physical Sciences Branch, OSM, who took part in the February 1, 1995, investigation, Rosenthal concluded at page 2 that "there is little likelihood that there has been subsidence associated with the first north operation of the Golden Eagle Mine that would have affected the Tatum home." In a February 16, 1995, memorandum to the Tatum file accompanying his Trip Report, Rosenthal stated:

> I have reviewed the subject [DMG] report and agree with the conclusions made by Jim Pendleton. I have never observed actual subsidence damage to a structure where there has been no foundation involvement. The observation of no drastic foundation failure by Jim Pendleton, in conjunction with worst case subsidence modeling, done by myself, would indicate that subsidence is not the cause of the cracking of the Tatum home.

By letter dated February 23, 1995, DMG notified OSM that it had completed its investigation into the subsidence question and that "the Tatum residence is not within an area where mine subsidence related to the 1st North Main of the Golden Eagle Mine is occurring or has occurred. Therefore the Tatum residence is not subject to mine subsidence impacts." By letter of the same date, it informed the Tatums of its conclusion. Five days later, the Acting Regional Director, Western Region Coordinating Center, OSM, sent information to the Tatums, which he stated had been

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developed using "our subsidence prediction model" and utilizing the approximate "35-degree angle of draw you suggested to me:"

> As our original calculations indicate, using the actual extraction ratio, extraction thickness, and percent hardrock from the geological maps, subsidence would not occur.
>
> In order to obtain an angle of draw of 34.52 degrees, we had to double the extraction thickness (to 15 feet), half the percent hardrock (to 15%) and assume 100% extraction (versus 31%). The calculations are shown on the attached computer printout. As you can see even with this theoretical situation, the subsidence would be less than an one-eighth of an inch. We noted that under this scenario that the railroad would have dropped 9.11 feet as it is located at the center of the subsidence curve. We found no evidence in the field indicating that the railroad tracks had subsided. [3/]

The Tatums hired two professional engineers to assess the conditions at their residence. Following a visit on February 23, 1995, William J. Attwooll, P.E., Vice President of Aguirre Engineers, Inc., prepared a document for the Tatums, dated March 16, 1995, and entitled "Report of Site Visit Observations Tatum Residence." Therein, he described his observations of damage to the interior and exterior of the residence. He discussed possible causes of the damage and summarized:

> [T]he Tatum residence has been damaged by settlement or displacements that are primarily evident in the two-story portion

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3/ In Ronald Maynard, 130 IBLA 260, 262-63 n.6 (1994), we stated:

"'Angle of draw' is defined in 1 SME Mining Engineering Handbook § 13.1-1 (1973) as 'the angle between a vertical line from the edge of the [mine] opening and another line extended to a point at which subsidence tails out to zero.' The Handbook states further:

'This angle has been found to be about 35E in Europe but is rather academic, being a function of instrument precision in detecting subsidence. Since the subsidence effect is so small at any point beyond a 25E angle, this latter may be considered the practical limit of subsidence. Furthermore, indications are that the angle of draw varies with depth and nature of the strata.'

(Footnote omitted).

'Angle of draw' is also defined in A Dictionary of Mining, Mineral and Related Terms, U.S. Department of the Interior, Bureau of Mines 39 (1968), as:

'In coal mine subsidence, this angle is assumed to bisect the angle between the vertical and the angle of repose of the material and is 20E for flat seams. For dipping seams, the angle of break increases, being 35.8E from the vertical for a 40E dip. The main break occurs over the seam at an angle from the vertical equal to half the dip.'" See M & J Coal Co. v. OSM, 115 IBLA 8, 21 (1990).

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> of the residence. However, recent cracks appear in other portions of the structure also. We have considered a variety of reasons for the damage that has occurred. Evidence does not exist to categorically attribute the damage to a specific cause; therefore, judgment has to be applied. Considering the possible causes of the damage, it is our opinion that the surface movements due to coal subsidence are a likely reason for the damage.

(Attwooll Report at 7.)

Also, Carlton E. Gerity, P.E., Pioneer Engineering, provided the Tatums with a "Progress Report on Tatum House Subsidence Issues" on April 12, 1995. Therein, he referenced the Attwooll Report, characterizing it as having concluded that "mining related subsidence could have caused the problem." (Gerity Report at 1.) In his opinion, OSM "used an incorrect model in their computer subsidence analysis. The correct model indicates that mine-influenced ground movement could certainly have affected the Tatum house." Id. DMG reviewed both of these reports and in a memorandum dated April 14, 1995, Pendleton stated:

> All the professionals involved agree that the Tatum residence is evidencing extreme structural distress. In my opinion the conclusion of Messrs. Gerity and Attwooll is that it hasn't been exhaustively demonstrated that subsidence did not cause the phenomena observed. I have discussed these reports with Mike Rosenthal of the OSM. Based on our professional experience in subsidence observation and evaluation, both Mr. Rosenthal and I are of the opinion that there is insufficient evidence for us to conclude that subsidence caused the phenomena observed at the Tatum residence. Semantically, these statements are not in contradiction. Inherent within their structure is a disagreement regarding the burden of proof.

On May 11, 1995, OSM and DMG officials, accompanied by BRI employees and Tatums' expert, Gerity, again inspected the Tatums' residence. It was agreed that another inspection would take place to include Dr. Jesse L. Craft, a subsidence expert with the Technical Assistance Team, Program Support Division, Appalachian Regional Coordinating Center, OSM. That inspection took place on May 23, 1995. Dr. Craft was accompanied by OSM, DMG, and BRI representatives, as well as Gerity.

That same day, another expert hired by the Tatums, John D. Reins, P.E., Senior Consultant with Madsen, Kneppers & Associates, Inc., issued a report to the Tatums of findings and preliminary conclusions following his inspection of their residence. At page 4-5, he stated: "We understand that other investigators have concluded that surface movements due to coal mine subsidence are a likely reason for much of the damage to the house. Our observations and interpretations of the distress are consistent with

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that explanation." Concerning the foundations, he observed that "[t]here was no significant distress or evidence of movement affecting the concrete foundation walls of the basement at the west end of the house." Id. at 2. In the foundation of the central portion of the house, there were "no indications of significant deterioration or distress," and he characterized the foundation as being "in surprisingly good condition considering the age of the structure." Id. He stated that he was unable to make a "close and detailed inspection of the foundations for the eastern (two-story) portion of the house" because of "limited access." Id. at 2-3. In describing the exterior of the house, he stated that "the south wall above the second story level near the east end of the house was badly deteriorated from prolonged exposure to moisture. The deterioration corresponded with the interior damage we noted within the upstairs sitting room." Id. at 3.

By letter dated June 7, 1995, DMG responded to four separate letters it had received from the Tatums in May 1995 regarding various aspects of the damage to the Tatums' house and investigations thereof. Therein, DMG stated:

> While it is true that we have observed evidence of movement of the upper walls in an outward motion, absolutely no evidence of movement of the foundation of the home has been observed by any parties. Movement of the foundation is the critical indicator of mine subsidence. Without evidence of movement of the foundation we can make no finding except that mine subsidence has not impacted the home. Further we continue to believe that no subsidence related to the 1st north mains has occurred.

On June 30, 1995, Dr. Craft released the report of his May 19, 1995, inspection. At pages 7-8 of that report, he concluded:

> The Tatum building complex is well outside any potential mining-related subsidence influence--even when conservatively assuming that 75 percent of the coal had been extracted and only 11 percent of the overburden is hardrock (Figures 3 and 4). With only 34 percent actual coal extraction, and 50 percent actual hard rock, it is highly unlikely that any surface subsidence has occurred over the 1 North entry. This conclusion is substantiated by two facts: 1) no railroad repair has taken place over the 1 North entry within the zone of expected maximum deformation other than normal maintenance; and 2) the subsidence monitoring over the similarly-configured 3 North entry shows no measurable subsidence. Furthermore, if the building complex was being influenced by mine related subsidence, the garage, patio, and concrete included in this area would be damaged. The cracks in the house would be tension type, and, therefore, wider at the base becoming narrow upwards. The water draining into the 1 North entry is from the coal bearing stratigraphic interval. The overburden is

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> too consolidated to subside as a result of water withdrawal, and since subsidence has not progressed upwards, there are no cracks that could impact the shallow alluvial wells.
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> The most likely causes of the damage to the Tatum House are modifications to the structure, poor maintenance, and/or stress applied to the structure by soil movement associated with dewatering by the trees during extended dry periods, in combination with poor maintenance of the roof, which would allow water to enter into the walls. An additional possible cause is the tree stump at the corner of the fire place. It is possible that the roots are rotting and the ground is losing support in this area causing movement of the foundation into the rotted areas. This is also a part of the foundation that cannot be evaluated through the crawl space under the house.

By memorandum dated July 17, 1995, the Acting Chief, Program Support Division, Appalachian Regional Coordinating Center, OSM, forwarded to the Regional Director, Western Regional Coordinating Center, OSM, a report of the findings of Dr. Kewal Kohli, Mining Engineer, Appalachian Regional Coordinating Center, OSM, who had visited the Tatums' home during the May 11, 1995, inspection. He concluded that the damage to the Tatums' home was not caused by BRI's underground mining of the 1st North Main. He stated that the actual extraction ratio for the 1st North Main was 34 percent and that no subsidence would occur because of an adequate safety factor for the pillars. He explained that Gerity had arbitrarily used an extraction ratio of 90 percent in the computer model to predict subsidence near the Tatums' house and that, as a result, his results were erroneous.

On August 23, 1995, in separate letters, DMG informed OSM and the Tatums that it had completed its investigation of damage to the Tatums' house and had concluded that the house was not within an area in which mine subsidence was occurring and that, therefore, the house was not subject to mine subsidence impacts. DMG requested that OSM issue a decision either upholding its response as appropriate or overturning it.

On September 18, 1995, the Regional Director, Western Regional Coordinating Center, OSM, issued a decision affirming AFO's February 4, 1994, decision that DMG had responded appropriately to Violations 1 and 3 of TDN No. 93-020-370-005. Therein, he stated:

> After full consideration of the factors in this matter, I find that the AFO Director properly determined that DMG's response to alleged violation 1 of 3 relating to damage to your residence due to subsidence contained in the ten-day notice constituted appropriate action. Further review of the record for Violation 3 of 3 discloses that DMG forwarded copies of the operator's maps and geologic cross sections along with narrative from the permit as documentation that the operator[']s plan existed. The AFO in its February 4, 1994, letter found

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> this documentation to fulfill the intent of the Colorado program. I concur with AFO's decision in finding that DMG's response to alleged violation 3 of 3 constituted appropriate action.

The Tatums filed a timely notice of appeal of the Regional Director's decision. The Board docketed that appeal as IBLA 96-91.

During this same time period, DMG was further investigating the alleged damage to the Tatums' water well, and by letter dated June 6, 1995, DMG notified OSM that, based on its technical investigation, it had determined that it was "likely that the water level in the well was influenced by adjacent underground workings and exhaust shaft, but that the water well is neither permitted nor is the water right adjudicated with the State Engineer's Office, and the operator took measures to minimize hydrologic impacts in the area of the well." It concluded that BRI was not in violation of its permit, the Colorado Surface Coal Mining Reclamation Act or State regulations, and it attached a copy of its investigative report.

In the report, DMG found at page 11 that, although the original complaint had alleged that mining operations had dried up the well, the well contained approximately 39 feet of water above the former well pump intake level; the well had been allowed to fall into a state of disrepair that inhibited water production; there had been no attempt to rehabilitate the well to maximize or maintain its productivity; BRI took appropriate measures to minimize groundwater inflows during drilling of the borehole and installation of the shaft; monitoring of the well for over a period of a year did not indicate a trend of a falling water table; and "[t]he owner of the well has not made a demonstration of injury, or that the capacity of the saturated thickness of the formation is now unable to meet historic usage."

By letter dated June 28, 1995, the Denver Field Office (DFO), OSM, determined, on the basis of DMG's June 6, 1995, letter and report, that DMG had taken appropriate action in response to Violation 2 of TDN No. 93-020-370-005. By letter of the same date, DFO informed the Tatums that it found DMG's actions appropriate with regard to Violation 2 and that OSM would not be conducting a Federal inspection or taking any enforcement action.

In a letter dated August 12, 1995, the Tatums requested informal review of DFO's June 28, 1995, decision, pursuant to 30 C.F.R. § 842.15. By decision dated August 24, 1995, the Regional Director, Western Regional Coordinating Center, OSM, issued a decision affirming the DFO's decision.

The Tatums filed a timely appeal of the Regional Director's decision. The Board docketed that appeal as IBLA 96-90.

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II. Discussion

[1] In accordance with section 503 of the Surface Mining Control and Reclamation Act of 1977 (SMCRA), 30 U.S.C. § 1253 (1994), a state with an approved state program has primary responsibility for enforcing SMCRA within its boundaries. However, notwithstanding the fact that a state may have been granted primary enforcement authority, OSM retains a significant oversight role to ensure compliance with SMCRA's mandates. Thus, where, pursuant to a citizen's complaint, OSM has reason to believe that a permittee is in violation of a state regulatory program, OSM is required to issue a TDN to the appropriate state regulatory authority. See 30 U.S.C. § 1271(a)(1) (1994); 30 C.F.R. § 842.11(b)(1). Under 30 C.F.R. § 842.11(b)(1)(ii)(B)(1), unless the state takes "appropriate action" to cause the violation to be corrected or shows "good cause for the failure to do so" within 10 days of receiving the TDN, OSM is required to conduct an immediate Federal inspection of the surface coal mining operation. See 30 U.S.C. § 1271(a)(1) (1994); 30 C.F.R. § 842.11(b)(1)(ii)(B)(1); Frank Hubbard, 145 IBLA 49, 52-53 (1998); Ambleside, Ltd., 135 IBLA 51, 57 (1996).

The applicable regulations further provide at 30 C.F.R. § 842.11(b)(1)(ii)(B)(3), that "appropriate action" includes "enforcement or other action authorized under the State program to cause the violation to be corrected." At 30 C.F.R. § 842.11(b)(1)(ii)(B)(4), the regulations list five situations which are considered to constitute "good cause" for a failure to take enforcement action. See Morgan Farm, Inc., 141 IBLA 95, 100 (1997); Ambleside, Ltd., supra at 58. "Good cause" is properly found when the State establishes that the violation of the State surface mining law "does not exist." 30 C.F.R. § 842.11(b)(1)(ii)(B)(4)(i); Morgan Farm, Inc., 141 IBLA at 100.

In deciding whether the State took appropriate action or demonstrated good cause for not taking enforcement action, the State's conduct will be judged by OSM, in its oversight role, not by what OSM would have done in the circumstances, but by whether the State acted arbitrarily or capriciously or abused its discretion under the State surface mining program law in its actions in response to the TDN. 30 C.F.R. § 842.11(b)(1)(ii)(B)(2); Morgan Farm, Inc., 141 IBLA at 100; Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA 59, 74, 102 I.D. 1, 9 (1995); Ronald Maynard, 130 IBLA 260, 266 (1994).

A person challenging an OSM decision not to order a Federal inspection or take Federal enforcement action in response to a citizen's complaint, because the State regulatory authority's response was appropriate or showed good cause for not taking action, bears the burden of establishing error in OSM's decision. Morgan Farm, Inc., 141 IBLA at 100; Ronald Maynard, 130 IBLA at 266. In order to do so in this case, the Tatums must show that DMG's action in response to the TDN was arbitrary, capricious, or

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an abuse of discretion. Appellants are clearly incorrect in their assertion that it is not their "responsibility to prove the mine DID cause the damage - the mine should prove that they didn't." (SOR 96-91 at 9.)

A. IBLA 96-90

We turn first to the appeal (IBLA 96-90) relating to Violation 1 of the TDN concerning appellants' water well.

[2] Appellants argue that the loss of their water supply constitutes a violation of section 720(a)(2) of SMCRA, 30 U.S.C. § 1309a(a)(2) (1994), and 30 C.F.R. § 817.41(j), and their State equivalents. 4/ Section 720(a) of SMCRA provides, in relevant part, that:

> Underground coal mining operations conducted after October 24, 1992, shall comply with * * * the following requirements:
>
> * * * * * * *
>
> (2) Promptly replace any drinking, domestic, or residential water supply from a well or spring in existence prior to the application for a surface coal mining and reclamation permit, which has been affected by contamination, diminution, or interruption resulting from underground coal mining operations.

30 U.S.C. § 1309a(a) (1994). To the same effect is 30 C.F.R. § 817.41(j). The applicable State regulation, 2 Colo. Code Regs. § 4.05.15 (1991), specifically provides, in pertinent part, that:

> Any person who conducts * * * underground mining activities shall replace the water supply of any owner of a vested water right which is proximately injured as a result of the mining activities in a manner consistent with applicable State law.

Our initial inquiry is whether or not the well in question constitutes a "drinking, domestic, or residential water supply" within the

4/ Section 720(a)(2) of SMCRA was added by section 2504(a)(1) of the Energy Policy Act of 1992, Pub. L. No. 102-486, 106 Stat. 2776, 3104, on Oct. 24, 1992, as a result of the court's Jan. 29, 1988, decision in National Wildlife Federation v. Hodel, 839 F.2d 694, 753-54 (D.C. Cir.), holding that section 717(b) of SMCRA, 30 U.S.C. § 1307(b) (1994), pertaining to the replacement of a water supply adversely affected by a "surface coal mine operation," did not apply in the case of damage caused by an underground operation.

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meaning of SMCRA, because, even if the record shows a diminution of the water supply, BRI is only liable if the water supply is subject to replacement.

Under the regulations at 30 C.F.R. § 701.5, the phrase "drinking, domestic, or residential water supply," as used in 30 U.S.C. § 1309a(a)(2) (1994), is defined as

> water received from a well or spring and any appurtenant delivery system that provides water for direct human consumption or household use. Wells and springs that serve only agricultural, commercial or industrial enterprises are not included except to the extent the water supply is for direct human consumption or human sanitation, or domestic use.

Appellants argue that the water well in question, which was designed to supply water for livestock, provides water for a "domestic use" under the regulation. On the other hand, OSM asserts that use for livestock purposes in this case is not domestic use and any diminution in that supply was not a violation of section 720(a) of SMCRA, 30 U.S.C. § 1309a(a) (1994).

OSM refers to the following language in the regulatory preamble:

> OSM concludes that the terms "domestic" and "residential" are intended to have broader meaning than merely drinking water for human consumption. Rather, these terms reasonably should be understood to include a full range of domestic uses, including irrigation of non-commercial gardens and agricultural fields, and use of well and spring water for household purposes other than human consumption.

60 Fed. Reg. 16722, 16723-24 (Mar. 31, 1995). The preamble states that this interpretation of section 720(a) of SMCRA properly extends the statutory requirement for water supply replacement to "private homeowners" who engage in "domestic uses [of water] such as non-commercial farming, gardening and other horticultural activities," as distinguished from commercial and other nondomestic water supply users:

> Many rural homeowners conduct extensive non-commercial domestic agricultural and horticultural activities, as an integral and even essential part of a homestead. Failure to require replacement of the water supply needed for such domestic agricultural and horticultural uses would fail to make the residential user whole.

Id.

OSM asserts that appellants' water supply does not constitute a "drinking, domestic, or residential water supply," within the meaning of

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section 720(a) of SMCRA, because the watering of livestock is a commercial agricultural use of water.

There is no evidence in the record that appellants used the well in question for any purpose after acquiring their property in 1988. However, they stated in their August 1995 request for informal review, that the pasture had been used to hold cattle and horses and "[i]f we had water at that location we could again use this location to hold our cattle and horses * * *." 5/ (Letter to OSM, dated Aug. 12, 1995, at 2.) Appellants' claim in their SOR at page 5 that "[a]ll our acreage is for domestic use," is belied by their statement in a copy of a letter in the record from appellants to Senator Phil Gramm, dated April 5, 1995, in which they represent that "[o]ur home and ranch in Colorado is a multi-million [dollar] operation * * *." A multi-million dollar operation that includes the pasturing, grazing, and watering of livestock is clearly a commercial operation.

Therefore, we must conclude that the well in question did not constitute a "drinking, domestic, or residential water supply," within the meaning of section 720(a) of SMCRA, 30 U.S.C. § 1309a(a) (1994), for which BRI was liable to provide a replacement. 6/

Likewise, the facts fail to show a violation of State law as alleged in the TDN. OSM asserts that appellants are only entitled to relief if BRI's underground coal mining operations interfered with a "vested water right," because, under 2 Colo. Code Regs. § 4.05.15 (1991), replacement is only required for a "vested water right." (Answer at 14.) OSM notes that DMG had already determined, as set forth in its June 6, 1995, letter, that appellants had no such right in the water from their well and that, since it was reasonable on its face, DFO was entitled to defer to that interpretation. (Answer at 14-15, citing Pittsburg & Midway Coal Mining Co. v. OSM, 132 IBLA at 89-90, 102 I.D. at 16-17.) OSM asserts that, absent a vested water right, DMG properly decided that BRI had not violated the State regulation.

5/ DMG stated that the well was located within a "fenced-in pasture of about 11 acres in size," but that the condition of the pasture, including "[s]ome" knocked-down fencing and "many" fence posts rotten at the base, indicated that it had not been "recently used for grazing." (June 1995 DMG Report at 2.)

6/ Given our conclusion, we need not decide whether BRI's actions resulted in a "diminution" of appellants' water supply from the well. Although DMG's June 6, 1995, letter to OSM states that "it is likely that the water level in the well was influenced by the adjacent underground workings and exhaust shaft," the attached report states that "[t]here has been no demonstration to the Division that there has been damage (a loss of beneficial use.)" (June 1995 DMG Report at 9.) It continued: "[A] possible drawdown caused by mining does not necessarily mean that the water right has been injured." Id.

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DMG's June 5, 1995, Report, states at page 9: "According to the State Engineer's Office, a vested water right as it applies to the Tatum windmill well, could be either a permitted well or an adjudicated water right, and the Tatum well is neither." It further stated that in accordance with State Engineer's Office policy, an unpermitted and unadjudicated well that has not been used for 10 years is considered abandoned. "The Tatum windmill well under current State Engineer's Office Policy, would be considered abandoned * * *." Id. at 10. The record shows that DMG investigated the records in the State Engineer's Office and was unable to uncover any records showing that the well was permitted or that there was any adjudication of the water rights for the well.

The determination that appellants did not have a vested water right served as the basis for DMG's conclusion that BRI was not required by section 4.05.15 of 2 Colo. Code Regs. (1991) to replace the water supply in appellants' well. Appellants have provided no evidence to the contrary, asserting only that DMG's conclusion "is simply NOT THE LAW." (SOR, IBLA 96-90, at 8.)

Appellants have failed to establish any error in DMG's determination or in OSM's acceptance of that determination. In his August 24, 1995, decision the Regional Director stated that he concurred with the DFO's decision not to initiate a Federal inspection or take Federal enforcement because DMG's response to the TDN was appropriate. We hereby affirm that decision, as modified, for the following reasons.

Under the regulations governing TDN's, an action or response by the State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the State program is considered "appropriate action" to cause a violation to be corrected or "good cause" for failure to do so. 30 C.F.R. § 842.11(b)(ii)(B)(2). Those regulations further state that "[a]ppropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected." 30 C.F.R. § 842.11(b)(ii)(B)(3). In this case, there was no enforcement or other action by DMG to cause the violation to be corrected. The reason is that DMG found no violation. Accordingly, OSM should have concluded that DMG's response constituted "good cause" for failure to take action because, in accordance with 30 C.F.R. § 842.11(b)(ii)(B)(4)(i), under the State program the violation did not exist. See Betty L. & Moses Tennant, 135 IBLA 217, 227-28 (1996); Patricia A. Marsh, 133 IBLA 372, 376-77 (1995).

B. IBLA 96-91

[3] Appellants have argued that the damage to their home constituted a violation of section 720(a) of SMCRA, and 30 C.F.R. § 817.121(c)(2), and

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their State equivalents. Section 720(a) of SMCRA provides, in relevant part, that:

> Underground coal mining operations conducted after October 24, 1992, shall comply with * * * the following requirements:
>
> (1) Promptly repair, or compensate for, material damage resulting from subsidence caused to any occupied residential dwelling and structures related thereto * * * due to underground coal mining operations. Repair of damage shall include rehabilitation, restoration, or replacement of the damaged occupied residential dwelling and structures related thereto * * *. Compensation shall be provided to the owner of the damaged occupied residential dwelling and structures related thereto * * * and shall be in the full amount of the diminution in value resulting from the subsidence.

30 U.S.C. § 1309a(a)(1) (1994). To the same effect is 30 C.F.R. § 817.121(c)(2).

"Material damage" is defined, in relevant part, as "[a]ny significant change in the condition, appearance or utility of any structure * * * from its pre-subsidence condition." 30 C.F.R. § 701.5. The applicable State regulation, 2 Colo. Code Regs. § 4.20.3(2) (1991), specifically provides, in pertinent part, that:

> Each person who conducts underground mining activities which result in subsidence that causes material damage * * * shall, with respect to each surface area affected by subsidence:
>
> (a) Restore, rehabilitate, or remove and replace each damaged structure * * * promptly after damage is suffered, to the condition it would be as if no subsidence had occurred * * *;
>
> (b) Purchase the damaged structure * * * for its fair market, presubsidence value * * *; or
>
> (c) Each person who conducts underground mining activities will compensate the owner of any surface structure in full amount of the diminution in value resulting from subsidence * * *.

DMG concluded, with the concurrence of OSM, that BRI's First North Main underground workings had not caused any damage to appellants' house as a result of mine subsidence. (Letter to OSM, dated Feb. 23, 1995, at 1; Letter to OSM, dated Aug. 23, 1995, at 1; Decision, dated Sept. 18, 1995, at 1-2.) DMG based its conclusion on the opinion of its expert,

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James Pendleton, an engineering geologist, as well as of OSM's experts, Michael F. Rosenthal, Dr. Jesse L. Craft, and Dr. Kewal K. Kohli, all of whom inspected appellants' house on one or more occasions.

Pendleton relied on the fact that there was no damage anywhere along the foundation of the house, either in the concrete walls and cement plaster coating on the walls of the basement or in the rubble stone foundation, and that such damage was necessary to establish that the house had been subjected to mine subsidence. This was substantiated by Kohli. (Kohli Report at 1.) Likewise, Rosenthal stated that he had "never observed actual subsidence damage to a structure where there has been no foundation involvement," thus ruling out mine subsidence as the cause of the damage to appellants' house. (Memorandum to File, dated Feb. 16, 1995.)

In addition, Rosenthal noted that the "worst case subsidence [computer] modeling" he had done also indicated that mine subsidence was not the cause of any of the damage to appellants' house. (Memorandum to File, dated Feb. 16, 1995 (referring to Trip Report at 2).) This was supported by Craft's own computer modeling. (Craft Report at 4-5, 7.)

Appellants contend that OSM erred in declining to initiate a Federal investigation and take Federal enforcement action because BRI's underground mining operations caused material damage to their home. (SOR, IBLA 96-91, at 1, 7, 12, 14-15.) They argue that the three professional engineers hired by them, Gerity, Attwooll, and Reins, as well as Vigil, the Las Animas County Building Inspector, each support the conclusion that the "majority" of the damage evident in their house resulted from mine subsidence. Id. at 1. They state that "[t]he study of the cause and effect of coal mining is not exact," but that "[n]o other reasonable explanation can explain what has happened to our home * * *." Id. at 2. Thus, appellants conclude that BRI was required to repair the damage to their house or compensate them for that damage. Id. at 12, 14.

Gerity believed that subsidence could have caused the damage to appellants' house because there was no verified distance from the mine workings to the house. (Memorandum to Tatums from Gerity, dated Dec. 27, 1994, at 3 ("My criticism of [DMG's] reports is they did not indicate that they * * * eliminated the possible [subsidence] effects because of the unsubstantiated distance").) He later stated, after further reviewing DMG's files and reference information and again visiting the site, that "[t]here is definitely the possibility of mine subsidence, and this subsidence could have affected the stability of the house." ("Report on the Potential Causes of Subsidence of the Solitario Ranch House," dated January 1995 at 2.) Gerity attributed this possibility first to the fact that subsidence "does occur" even with limited extraction room and pillar mining: "Over time, the mine roof may fail, the pillars may fail, or the mine floor may fail. Failure is often accelerated by water in the mine, affecting the stability of the rocks, and failure can also occur when the floors are soft." Id. at 3; see Memorandum to Tatums from Gerity, dated July 13, 1995, at 2-3.

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Attwooll, who inspected Appellants' house on February 23, 1995, concluded that the cracks observed in the exterior and interior walls were wider and more pronounced in the eastern two-story portion of the house than in the western one-story portion, where the cracks were from hairline to less than one-eighth of an inch wide. (Letter to Appellants, dated March 16, 1995, at 1-2.) He attributed the narrow cracking generally in the western one-story portion of the house to the normal aging process of an old adobe house, but the severe cracking generally in the eastern two- story portion of the house, which was "[r]elatively recent [and] * * * possibly ongoing," to a "settlement incident." Id. at 3. He pointed out that the freshness of some of the cracks was "indicated by the separation of recently painted surfaces." Id.

Attwooll then proceeded to assess the possibility that this extensive cracking was caused by water leaking from the roof, the rotting roots attached to the stumps of two large nearby cottonwood trees, fluctuations in the high water table, poor drainage around the house, deterioration of walls above the foundation, or, finally, subsidence extending northeast from BRI's First North Main mining. (Letter to Appellants, dated March 16, 1995, at 4-6.) He ruled out each of the possible explanations other than mine subsidence, mostly because none explained the extent or recent nature of the damage to the eastern two-story portion of the house. Id. While he believed that the evidence did not categorically point to a specific cause for the damage, considering the lack of other possible causes and the fact that damage had been occurring since the mining took place, Attwooll concluded that "surface movements due to coal mine subsidence are a likely reason for the damage." Id. at 7.

Reins, who inspected the house on April 24, 1995, agreed with Attwooll that the damage was "fairly recent" and mostly on the eastern two-story portion of the house. (Letter to Appellants, dated May 23, 1995, at 2.) He also noted that the damage was likely due to a rotation of the east and south walls downward and away from the rest of the house, since the consistent (rather than random) orientation and pattern of the damage supported that conclusion. Id. at 4; Memorandum to Appellants, dated June 30, 1995, at 3. While, like Pendleton, he had not been able to inspect the foundation underlying this portion of the house, Reins nevertheless stated:

> The locations, geometry, and orientation of the distress within house strongly suggest that the east and south walls are rotating away from the rest of the structural framing. It appears that the foundation systems beneath these two walls have subsided. The magnitude of the subsidence does not appear to be particularly substantial. However, even a fairly subtle movement of the foundation would be magnified in the movements and rotations of the framing and bearing walls above.
>
> If the residence was a conventional, wood-framed house, these relatively small movements might have been easily accommodated without significant distress. However, adobe construction is inherently incapable of resisting or accommodating such

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> movements and will, in fact, provide a clear and pronounced manifestation of even minor subsidence.

(Letter to Appellants, dated May 23, 1995, at 4.) He later explained the absence of any evidence of distress in the foundation on the basis that the foundation and the overlying adobe structure had moved in tandem, but that the distress was exhibited only in the relatively fragile adobe structure and not in the foundation:

> [B]ecause of the lack of tensile capacity and reinforcing within adobe structures, they will quickly and sometimes dramatically exhibit cracking and separation distress if the original building geometry is distorted. Unlike conventional reinforced concrete, steel or timber structures which have an ability to resist, bridge or redistribute loads, and thus minimize visible signs of distress, adobe structures immediately tell you if something is moving.

(Memorandum to Appellants, dated June 30, 1995, at 3-4.) In his May 23, 1995, letter to appellants, Reins stated at page 4 that he agreed with the opinion of the Tatums' other consultants that mine subsidence was the "likely reason for much of the damage to the house." In his subsequent June 30, 1995, he stated at page 3:

> Apparently, the underlying premise which prompts Mr. Pendleton to reject the notion that subsidence has occurred is that there is no known foundation distress. In our practice we routinely observe foundation systems that exhibit no significant distress despite pronounced (many inches) heave or settlement. In this particular instance we estimate that the foundation movements are not particularly substantial. As such, the foundation system for the house is simply "going along for the ride."

Following completion of briefing in the case, the Tatums filed with the Board on February 26, 1998, a supplemental exhibit, designated by them as Exhibit A-15, in support of their position that mine subsidence caused damage to their home and that OSM acted improperly in finding DMG's response to the TDN to be appropriate. That exhibit is a copy of a decision issued on December 1, 1997, by the District Court, County of Las Animas, Colorado, in the matter styled James (Jim) Tatum and Ann Tatum v. Basin Resources, Inc., No. 92 CV 127. Therein, District Judge Jesse Manzanares found, inter alia, that

> [e]vidence at trial established that extensive underground coal mining operations were conducted near, and under the plaintiffs['] property line and within 300 feet of their residence. Subsidence was evident in various locations on the Tatum property, including the railroad tracks running through

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> the Tatum property, and a sink hole near the Tatum residence. [7/] The Tatum residence was considerably damaged by the subsidence, which was caused by the mining operation.

(Decision at 4.) The Judge awarded the Tatums compensatory damages for the diminution in value of their property.

In an order dated August 17, 1999, this Board directed the Office of the Solicitor to respond to Exhibit A-15 within 30 days of receipt of that order. Over 60 days later, on October 25, 1999, the Board received a request from counsel for OSM seeking "an extension of time, consisting of 3 days, until Monday, October 25, 1999," in which to file a response to the Board's order. On October 29, 1999, the Board received a request from counsel for a second extension of time to file, this time "until Wednesday, October 27, 1999." The Board received a third request for extension of time from counsel on November 1, 1999, seeking an extension to file "until November 3, 1999." Counsel did not file any response to our order.

By order dated November 12, 1999, the Board denied the requests for extension and ruled that any submission made by counsel in response to August 17, 1999, order after the date of our November 12, 1999, order would not become a part of the record in this case.

The evidence of experts for the State and OSM tends to establish that something other than subsidence, although there is no agreement as to what, caused the structural damage to the Tatums' house. The Tatums' experts, on the other hand, appear to agree that there is little explanation for the damage other than subsidence.

However, the Tatums have also presented a copy of Judge Manzanares' decision which was rendered following a 6-day hearing in April 1997 during which he heard the testimony of "approximately twenty-eight (28) witnesses and received over one hundred (100) exhibits into evidence." (Exh. A-15 at 1.) OSM has not timely responded to a direction to address the Judge's decision. In his decision, the Judge found that subsidence was the cause of "considerable" damage to the Tatums' house.

As stated above in the discussion concerning IBLA 96-90, under the regulations governing TDN's, an action or response by the State regulatory authority that is not arbitrary, capricious, or an abuse of discretion under the State program is considered "appropriate action" to cause a

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7/ We find no other reference to a sink hole in the record in this case other than in Appellants' Response to Appellee's Original Answer, where they state at page 3, "[a] sinkhole or depression has now appeared just south of the Tatum's house. This fits the trial testimony that a sinkhole or depression could be expected in the event of soft floor or pillar failure."

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violation to be corrected or "good cause" for failure to do so. 30 C.F.R. § 842.11(b)(ii)(B)(2). Those regulations further state that "[a]ppropriate action includes enforcement or other action authorized under the State program to cause the violation to be corrected." 30 C.F.R. § 842.11(b)(ii)(B)(3).

In this case, there was no enforcement or other action by DMG to cause a violation to be corrected because DMG found that BRI's mining operation did not cause subsidence damage to the Tatum residence. Under the regulations, OSM was to determine "whether the standards for appropriate action or good cause for such failure" were met. 30 C.F.R. § 842.11(b)(ii)(1)(B)(1). Although DMG took no action, the OSM AFO concluded that DMG took appropriate action. The Regional Director affirmed that conclusion. However, if OSM considered DMG's determination not to be arbitrary, capricious, or an abuse of discretion under the State program, it should have concluded that DMG's response constituted "good cause" for failure to take action because, in accordance with 30 C.F.R. § 842.11(b)(ii)(B)(4)(i), under the State program the violation did not exist. See Ernest Back, 135 IBLA at 249-50.

We believe, however, that the present record establishes by a preponderance of the evidence that a violation did exist. Appellants have presented a decision issued by a Colorado State court in a case involving them and BRI. Although neither DMG nor OSM were parties to that proceeding, the Judge determined that subsidence caused by BRI's mining operation did, in fact, damage appellants' residence. Such a finding establishes a violation of the Colorado State program under 2 Colo. Code Regs. 4.20, as cited in the TDN.

We conclude that DMG's determination that no violation existed, which served as the basis for OSM's actions under 30 C.F.R. § 842.11(b)(ii)(B)(1), is, therefore, not supported by the present record and is arbitrary, capricious, and an abuse of discretion. For that reason, we cannot uphold the Regional Director's decision and, hereby, vacate it. In addition, the underlying AFO decision is also vacated. The case is remanded to OSM for appropriate action.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 C.F.R. § 4.1, the decision appealed from in IBLA 96-90 is affirmed as modified and the decision appealed from in IBLA 96-91 is vacated and the case remanded to OSM for appropriate action.

_____
Bruce R. Harris
Deputy Chief Administrative Judge

I concur:

_____
James L. Byrnes
Chief Administrative Judge

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